NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ASCENSION GARCIA, Appellant.	2 CA-CR 2007-0293 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700176

Honorable Charles A. Irwin, Judge

AFFIRMED

John William Lovell
Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Ascension Garcia was convicted after a jury trial of driving under the influence of an intoxicant while impaired to the slightest degree while his license was suspended (DUI). Garcia was sentenced to the presumptive prison term of 2.5 years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and

State v. Clark, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Garcia has not filed a supplemental brief.

¶2 Counsel has asked that we consider a number of arguable issues. First, he suggests the trial court may have erred when it denied his motion for new trial based on his assertion that his involuntary absence from trial had been prejudicial. The court denied the motion after an evidentiary hearing. We will not disturb a court's ruling on a motion for new trial absent an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

¶3 Garcia did not attend the first day of trial. His counsel learned the next day that Garcia had been arrested and was in jail when the trial had begun. After discussions between the court and counsel, defense counsel chose not to request a mistrial and waived Garcia's appearance from the preceding day. Counsel agreed the resolution of the matter would include an instruction to the jury that Garcia had not attended for reasons beyond his control. Under the circumstances, he has waived this claim. *Cf. State v. Moraga*, 98 Ariz. 195, 200, 403 P.2d 289, 293 (1965) (defendant waived objections to proceedings by withdrawing motion for mistrial).

¶4 Counsel also asks us to consider whether Garcia's rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), were violated when the state struck from the venire panel "two . . . people of color" and a third who "appear[ed] brown."[1] Garcia is Hispanic. But the state offered a race-neutral reason for striking these members of the panel, and nothing

[1]Defense counsel withdrew the objection with respect to a fourth person.

in the record establishes the reason was pretextual. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). This arguable issue therefore lacks merit.

¶5 Counsel next asks us to consider whether the trial court erred when it granted the state's request to amend the indictment after defense counsel moved to preclude the state from introducing evidence that Garcia "was in physical control of a[n] automobile or operating an automobile." The state argued actual physical control of a vehicle and driving were alternative forms of one charge of DUI. Based on this court's decision in *State v. Rivera*, 207 Ariz. 69, 83 P.3d 69 (App. 2004), the court agreed and amended the indictment to include "[o]r actual physical control." Based on § 28-1381(A) and *Rivera*, the court did not err.

¶6 Counsel also asks us to consider whether error resulted from the testimony of a Cochise County Sheriff's Department deputy that Garcia's driver's license was suspended at the time he committed the offense. Because the records from the Motor Vehicle Division of the Arizona Department of Transportation were properly admitted, and included this information, any error in this regard was of no moment. *See generally State v. King*, 213 Ariz. 632, 146 P.3d 1274 (App. 2006); *see also State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (erroneous admission of cumulative evidence harmless error).

¶7 Finally, counsel asserts as an arguable issue that the trial court abused its discretion when it refused defense counsel's request for a "safe harbor" jury instruction based on *State v. Zavala*, 136 Ariz. 356, 359, 666 P.2d 456, 459 (1983). The requested instruction was that, if the jury found Garcia had been sleeping in his car when the officer

approached him and that he had pulled the car off the roadway and turned off the engine, he was not in actual physical control of the vehicle. Although the court refused the instruction, it permitted counsel to argue the issue to the jury. Also based on *Zavala*, counsel suggests that the verdict was contrary to the weight of the evidence and that the court erred when it denied his post-verdict motion for judgment of acquittal.

¶8 In *Zavala*, our supreme court held that the intoxicated defendant in that case could not have been found guilty of being in actual physical control of the vehicle for purposes of the DUI statute because he was found unconscious in the vehicle, which was parked on the side of the road with the key in the ignition, but in the off position. *Id*. at 357, 359, 666 P.2d at 457, 459. But the supreme court limited *Zavala* somewhat in *State v. Love*, 182 Ariz. 324, 327, 897 P.2d 626, 629 (1995), rejecting *Zavala* to the extent it had suggested there existed a bright-line defense to a DUI charge. The court in *Love* held instead, that whether a person had actual physical control of a vehicle is a question for the trier of fact to determine on a case-by-case basis. 182 Ariz. at 328, 897 P.2d at 630. Therefore, Garcia's requested instruction did not accurately state the law. Thus, the trial court did not err in refusing it. *See State v. Barr*, 183 Ariz. 434, 443 n.3, 904 P.2d 1258, 1267 n.3 (App. 1995) ("A trial court does not err by refusing an instruction that is an incorrect statement of law.").

¶9 The evidence here established, *inter alia*, that Garcia was asleep when the officer arrived at a little before 1:00 p.m. The officer found Garcia slumped over the steering wheel with the keys in the ignition. The officer had to yell at him twice to awaken him.

Garcia was the only one in the vehicle, which had been pulled over to the side of the road, facing a major highway, with the hood up. Garcia said he was drunk and admitted he had been drinking since six in the morning and had been driving for a half hour before he stopped. When asked when he had stopped drinking, he said, "never." Thus there was sufficient evidence he had been driving while impaired to the slightest degree before his car came to a rest. The court did not err when it denied the motion to set aside the verdicts based on insufficient evidence.

¶10 We have also considered the instruction the trial court gave in this case in light of our recent decision in *State v. Zaragoza*, 535 Ariz. Adv. Rep. 14 (Ct. App. Jul. 23, 2008). The court gave the instruction we recommended in *State v. Dawley*, 201 Ariz. 285, ¶ 9, 34 P.3d 394, 397-98 (App. 2001). That instruction permitted the jury to find the defendant in actual physical control of the vehicle if his potential use of the vehicle presented a danger. *Id.* In *Zaragoza*, we found fault with the instruction because it suggested to the jury it could find the defendant guilty based on his potential use of the vehicle. 535 Ariz. Adv. Rep. 14, ¶ 7. Thus, we reasoned, the jury could have believed the defendant's contention that he was simply sleeping in his car with no intent to drive it but be required to find him guilty nevertheless, simply because he had the potential of driving at some point while still intoxicated. *Id*. ¶ 10.

¶11 But here, unlike in *Zaragoza*, there was ample evidence Garcia had actually driven the vehicle while impaired; he admitted he had been drinking all day and admitted he had driven; the officer had passed the area earlier in the morning, after 6:00 a.m., Garcia's

vehicle was not there but appeared later; and the jury readily could infer Garcia had driven or been in actual physical control of the vehicle as proscribed by our state's DUI laws. The evidence, which is discussed above, did not suggest he had only been using the car as a temporary shelter until he became sober during the entire period he was impaired. And a defendant can be convicted of DUI if the state proves circumstantially that the defendant drove while under the influence of alcohol and then parked his vehicle. *See State ex rel. O'Neill v. Brown*, 182 Ariz. 525, 527-28, 898 P.2d 474, 476-77 (1995). On these facts, any error the trial court committed when it instructed the jury pursuant to *Dawley* was harmless. *See State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003).

¶12 We have, as requested, reviewed the entire record for fundamental error. Having found no fundamental, reversible error, we affirm the conviction and the sentence imposed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge